Here, the taxpayer was continuing to trade and while the action for damages was always a possibility if it should refuse to abide with the terms of its agreements, the purpose was factually not to invite this action and to retain the services of the agents for the remaining acres of its estate holdings in the new role they had to play.

Revenue also suggested that within the limits of an appeal on a case stated, set out by Lord Radcliffe in *Edwards* v. *Bairstow & Harrison,*[27] in a well-known passage at page 35 which has been considered in the judgments of this court, *inter alia,* in *Comptroller-General of Inland Revenue, Malaysia* v. *T.*[28] at page 24, we should not disturb a finding of fact by the Special Commissioners. The short answer is that the finding was not one of fact but as shown earlier, a conclusion of law upon admitted facts, as in the *Godden* v. *A. Wilson's Stores (Holdings) Ltd.* case itself and in such a situation, the High Court was correct in overruling the decision of the Special Commissioners if their conclusion was one that was wrong in law.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*

NG CHENG YOON v. MAH BINTI MAT ISA

[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) August 1 & November 26, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 158 of 1979]

Practice and Procedure — Summary judgment given in favour of plaintiff — Whether final judgment — Appeal — No application for further argument in open court — R.S.C. 1957, O. 54 r. 22A — Courts of Judicature Act, 1964 ss. 4 & 68(2).

In this case the respondent had applied by summons-in-chambers for specific performance of an agreement for sale of land and she had obtained summary judgment as prayed. The appellant appealed. It was argued that the appeal was not properly brought as no application had been made for further argument in open court and no certificate was given by the judge that no further argument was required.

Held: the judgment in this case was a final judgment and there was no necessity for the appellant to comply with Order 54 rule 22A of the Rules of the Supreme Court, 1957.

Cases referred to:-

(1) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.

(2) *Ratnam* v. *Cumarasamy & Anor.* [1962] M.L.J. 330.

(3) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2)* [1970] 1 M.L.J. 253.

(4) *Hong Kim Sui & Anor.* v. *Malayan Banking Bhd.* [1971] 1 M.L.J. 289.

(5) *Arumugam Pillai* v. *Government of Malaysia* [1980] 2 M.L.J. 283.

FEDERAL COURT.

W.S.W. Davidson for the appellant.

Lalchand N. Thadani for the respondent.

Cur. Adv. Vult.

Wan Suleiman F.J. (delivering the judgment of the Court): The respondent, plaintiff in High Court, Ipoh Civil Suit No. 69 of 1979, applied by way of summons-in-chambers for an order pursuant to Order 14A of the Rules of the Supreme Court 1957 for specific performance of an agreement dated February 1, 1969.

In her affidavit in support of her application the respondent deposed that by an agreement in writing dated February 1, 1969 the appellant had agreed to sell and transfer to her an undivided 176/1117 share in the property held under Certificate of Title No. 3480 for Lot No. 20677 in the Mukim of Teja, District of Kinta in consideration of the sum of $4,400.

She duly paid this sum as was acknowledged in the agreement by the appellant. This agreement was executed before a firm of solicitors in Ipoh.

The appellant also agreed to submit an application for sub-division, which the appellant had failed to do.

In another agreement on the same day, the appellant had also agreed to sell 841/1117 undivided share to the respondent and another 80/1117 undivided share to one Chong Wan Sen and transfer under this latter agreement was effected on April 21, 1977.

Respondent further deposed that she was ready and willing to perform her obligations under the first mentioned agreement.

Chong Wan Sen confirmed by affidavit that he had been a witness to the first-mentioned transaction and also stated that the sum of money mentioned therein was paid in his presence by the respondent to the appellant.

There was no affidavit in reply.

The learned trial judge granted summary judgment for the plaintiff (respondent) as prayed. The defendant (appellant) appeals against this decision.

The respondent, however, raised a preliminary objection contending that the appeal has not been properly brought because the provisions of section 68(2) of the Courts of Judicature Act and Order 54 rule 22A have not been complied with, the judgment being an interlocutory judgment. No application has been made for further argument in open court and no certificate was given by the judge that no further argument was required.

The Courts in England have tended to differ in their views of what is the proper test to be applied as to whether such a judgment is interlocutory or final, but this court has consistently applied what is known as the *Bozson* test which, as laid down by Lord Alverstone in *Bozson* v. *Altrincham Urban District Council*[1] is this:

"Does the judgment or order as made, finally dispose of the rights of the parties? If it does then I think it should be treated as a final order, but if it does not, it is then in my opinion, an interlocutory order."

The *Bozson* test was first adopted by our then Court of Appeal in *Ratnam* v. *Cumarasamy & Anor.*[2] and has since been applied by this court in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2)*[3] and

Hong Kim Sui & Anor. v. *Malayan Banking Bhd.*[4] In *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2), supra,* the respondent had (as in this case) obtained a summary judgment under Order 14A against appellants on a specially indorsed writ relating to an agreement for sale of land. The appellants' appeal to the Federal Court was dismissed. (See [1970] 1 M.L.J. 149). The appellants sought leave to appeal to the Yang di-Pertuan Agong and it was argued by the respondent that the judgment was not a final judgment. It was held that the judgment was a final judgment.

We have considered the effect of Order 54 rule 22A which reads:

"Any party dissatisfied with any order made by a judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

If the term "any order" therein includes both interlocutory and final order, then that rule is in conflict with section 68(2) of the Courts of Judicature Act.

This rule, together with the other Rules of the Supreme Court came into force on April 1, 1958 (see L.N. 42 of 1958).

Section 4 of the Courts of Judicature Act provides that where there is any inconsistency between the Act and any other written law other than the Constitution, in force at the commencement of the Act, the provisions of the Act shall prevail. The Act came into force in March 1964 (apart from section 5 which came into effect earlier and is irrelevant for our purposes).

Our attention has been drawn since the argument of this appeal, to the judgment of this court, *Arumugam Pillai* v. *Government of Malaysia,*[5] in which another panel of this court decided that the words "any order" in the old Order 54 rule 22A must mean and include a final order.

In view of our reading of the effect of section 4 of the Courts of Judicature Act we are of the considered opinion that the objection raised by the respondent should be dismissed with costs.

Objection dismissed.

Solicitors: *Lewis & Co.; Kamaluddin Maamor & Co.*

WONG YOON CHAI v. LEE AH CHIN

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Abdul Hamid F.JJ.) October 11 & November 26, 1980]

[Johore Bahru — Federal Court Civil Appeal No. 151 of 1980]

Practice and Procedure — Application for foreclosure of charged land dismissed — No order made for delivery of issue document of title and discharge of charge — Application made by summons-in-chambers — Application should have been made by originating summons — Irregularity — R.S.C. 1957, O. 54 r. 22, O. 55 r. 5A & O. 70 r. 1.

Contract — Moneylending transaction — Application for foreclosure of charged land dismissed — Claim for restitution of money lent — Claim dismissed — Contracts Act, 1950, s. 66.

The appellant had applied for foreclosure of charged land arising from a moneylending transaction and the application had been dismissed. No consequential orders were made. Subsequently the respondent applied by summons in chambers for an order for the delivery of the issue document of title, the discharge of the charge and the cancellation of the memorial of the charge. In the same proceedings the appellant claimed restitution. The learned judge of the High Court gave orders in terms of the respondent's application but dismissed the appellant's claim for restitution. The appellant appealed.

Held: (1) the application of the respondent should have been made by originating summons but the failure to comply with the procedure laid down under the Rules of the Supreme Court was only an irregularity which was curable under Order 70 rule 1 of the Rules;

(2) in this case the appellants could not have been ignorant of the fact that he had breached the Moneylenders Ordinance and therefore there could not be an order for restitution.

Case referred to:-

(1) *Menaka* v. *Lum Kum Chum* [1977] 1 M.L.J. 91.

FEDERAL COURT.

T.H. Chong (*K.H. Chong* with him) for the appellant.

Elyas Majeed for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the judgment of the Court): This is an appeal against the whole of the decision of the High Court, Johore Bahru ordering the chargee (appellant in this case) to deliver to the chargor (respondent in this case) the issue of document of title, namely, Certificate of Title No. 8320 for Lot No. 5688, Mukim of Senai/Kulai, the discharge of charge and the memorial of the said charge be cancelled both on the original document of title with the Registrar of Title and the issue of document of title relating to the charge.

The respondent applied for the orders after appellant's application by way of Originating Summons (No. 242/77) for foreclosure action arising from a moneylending transaction was dismissed by Anuar J.

The application was made by way of summons-in-chambers. In the supporting affidavit the respondent affirmed that his counsel through inadvertence, had failed to apply for the consequential orders. The appellant contended that the foreclosure action was dismissed merely on point of law and claimed restitution in the sum of $12,693.50.

Yusoff J. gave orders in terms of the respondent's application. He dismissed the appellant's claim